
Central Law Journal.

ST. LOUIS, MO., MAY 3, 1901.

In 1898 the legislature of Massachusetts enacted a statute known as the Negotiable Instrument Law which provides that presentment for payment shall be necessary to charge an indorser, except as therein otherwise provided. Section 82 provides that presentment is dispensed with "(3) by waiver of presentment, express or implied." By section 115 notice of dishonor is not required "where the indorser is the person to whom the instrument is presented for payment." In decisions made before the act was passed the Supreme Judicial Court of the State had declared that any words or acts of an indorser of a note, which in fact misled and put the holder off his guard and reasonably induced him to omit due presentment and notice of non-payment, would constitute an implied waiver thereof. In a proceeding entitled *In re Swift*, recently decided by the United States District Court, D. Mass. (106 Fed. Rep. 65), it appeared that a firm gave a note, which was indorsed by one of the partners. Shortly before its maturity the indorser consulted with the holder with reference to the making of an assignment by the firm and the partners for the benefit of creditors, stating their insolvency, and that neither he nor the firm would be able to pay the note at maturity, and, as a result of the conference, such an assignment was made before the date of the maturity of the note. It was held that under the statute, as well as by the law merchant, there was an implied waiver of presentment, which also excused notice to the indorser of non-payment, under section 115 of the statute; the indorser being the person to whom the note would have been presented but for the waiver, and the case being fairly within the intent and meaning of such provision.

A new question, or rather a new application of old principles of law to conditions resulting from modern devices, recently came up before a *nisi prius* court of Indianapolis. The case is *Manufacturers' Natural Gas Co. v. Indianapolis Street Ry. Co.* The plaintiff

is a corporation owning in the streets of that city a pipe line for the purpose of transporting and furnishing natural gas for fuel and lights. The defendant corporation owns and operates electric street cars upon the streets of that city by what is known as the single trolley system.

The plaintiff sought to recover damages to its pipes, claimed to be caused by the action of electricity on said pipes, which electricity it is claimed is discharged into the earth along the street by the defendant in the operation of its cars, the said action of electricity on said pipes being what is known as electrolysis. While admitting the damage to plaintiff's pipes, defendant, in opposition to plaintiff's right to recover, assumed the position: 1st. That the use made by the streets by it is the dominant use for which the streets were dedicated to public use, to-wit: The right to use the streets by the public in passing over and along the same, while the use made of said streets by the plaintiff is subservient to such dominant use, and that therefore the defendant is not liable for the injuries complained of except in case of negligence. 2d. That the damages claimed by plaintiff are merely incidental to the lawful exercise by defendant of a franchise granted by the State for the benefit of the public and therefore not recoverable. The defendant placed special reliance upon three decided cases, to-wit: *Hudson River Tel. Co. v. Watervliet Turnpike and Railroad Co.*, 135 N. Y. 393; *Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Assn.*, 48 Ohio St. 390; *Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.*, 42 Fed. Rep. 279. These were all cases by telephone companies in which it was sought to enjoin the street railway companies from operating their respective roads by electricity. In each one of these cases the use of the street by the telephone company was by statute or charter made subservient to the uses to which the railway company was putting such streets. And in the Ohio and New York cases it was also held that the use of a street by a telephone company was not one of the uses for which the streets were originally dedicated. In Indiana, however, it has been held in the case of *Magee v. Overshimer*, 150 Ind. 127, that the use of the street for telephone purposes was one of the uses contemplated when

the streets were originally dedicated, and, under the principle of this case, the use of the street for gas pipes is one of the uses for which the street was originally dedicated. The Indianapolis court held that the defendant was liable for the damages, and that the defendant by the use of approved appliances, could, at a reasonable expense, have prevented the injury to plaintiff's pipes, and that it was negligent in not so doing. "If," says the court, "it be conceded that the operation of street cars by electricity and the maintenance of a pipe line to convey and furnish natural gas, cannot both exist on the same street, then the courts would be compelled to choose between them and pronounce in favor of the one which is of the larger benefit to the public. But the situation, as set forth in the complaint, presents no such case. Stripped of all its coverings it is simply this: Here are two corporations, each occupying the streets by legal authority, each performing a service to the public, and each being compelled, under the law, to serve the public. The method in use by the defendant in operating its cars results in serious injury and in some cases, to the destruction of plaintiff's pipes. The defendant can, by the use of an approved appliance at reasonable expense, so operate its cars as to avoid injuring the plaintiff's pipes. The plaintiff cannot, by any known method, protect its pipe from injury."

NOTES OF IMPORTANT DECISIONS.

DEED—DELIVERY.—The Court of Chancery of New Jersey holds, in *Schlicher v. Keeler*, 48 Atl. Rep. 393, that where a grantor delivers a deed to a stranger as agent of the grantee, to hold till the grantor's death, with no power of control reserved by the grantor, there is a valid delivery, though the grantee had not empowered the stranger to act for him in holding the deed. The court says:

"Mr. Devlin, in volume 1, § 280 (11th Ed.), of his work on Deeds, uses the following language: 'Where a grantor executes a deed, and delivers it to a third person to hold until the death of the grantor, the latter parting with all dominion over it, and reserving no right to recall the deed or alter its provisions, it seems to be settled by the weight of authority that the delivery is effective, and the grantee, on the death of the grantor, succeeds to the title. A delivery of this kind may be considered in effect an escrow, but differs from

that in the fact that a delivery in escrow is dependent on the performance of some event, and not upon the lapse of time.' A large number of cases are quoted by Mr. Devlin in support of the text. According to Mr. Chamberlain, there was no condition coupled with the delivery to him; no power to recall the deed was reserved by the grantor. By the words used at the time of the delivery of the deed to Mr. Chamberlain, the latter took possession as the agent of the grantee, and not, as in *Peck v. Rees*, 7 Utah, 467, 27 Pac. Rep. 581, 13 L. R. A. 714, as agent of the grantor. Nor did it matter whether Henry had or had not empowered Mr. Chamberlain to act for him in holding the deed. The delivery to Mr. Chamberlain with no power of control reserved by the grantor raised a presumption of acceptance by the grantee. The leading case in England upon this kind of delivery is *Garnons v. Knight*, 5 Barn. & C. 671. Wynn made a mortgage to Garnons, whom he owed. He delivered the mortgage to his niece, saying: 'Here, Bess; keep this. It belongs to Mr. Garnons.' He again took the mortgage from Bess, but again returned it to her, saying, 'Here, put this by.' Garnons knew nothing of this. Wynn died. In an action of ejectment brought by the mortgagee the question whether there had been a delivery of the mortgage was found in favor of the mortgagee. It came before the court of king's bench on rule to show cause why a new trial could not be granted. In his opinion delivered in the case Mr. Justice Bailey proceeded to say: 'Sheppard, who is particularly strict in requiring that the deed should pass from the possession of the grantor, lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorized to receive it, or delivery to a stranger for his use and to his behalf.' Again, he says: '2 Rolle, Abr. "K," 24, p. 1. 7, Taw v. Bury, Dyer, 167, *Alford v. Lea*, 2 Leon, 111, and 3 Coke, 27, are clear authorities that on a delivery to a stranger for the use or on the behalf of the grantee the deed will operate *instantly*, and its operation will not be postponed till its delivery over to be accepted by the grantee.' The passage of Rolle's Abridgment is this: 'That if a man make an obligation to I, and delivers it to B, if I get the obligation, he shall have action upon it, for it shall be understood that B took the deed for him as his servant. 3 H 6-27.' The rule so laid down by the court of king's bench was approved by Mr. Justice Van Syckel in his opinion delivered in the case of *Jones v. Swayze*, 42 N. J. Law, 279. To the same effect is the law of the State of New York: *Church v. Gilman*, 15 Wend. 656; *Hathaway v. Payne*, 34 N. Y. 92; *Fisher v. Hall*, 41 N. Y. 421; *Munoz v. Wilson*, 111 N. Y. 295-303, 18 N. E. Rep. 855; *Rosseau v. Bleau*, 131 N. Y. 177-183, 30 N. E. Rep. 52,—and in Massachusetts: *Wheelwright v. Wheelwright*, 2 Mass. 447-452; *Foster v. Mansfield*, 3 Metc. (Mass.) 412; *Moore v. Hazelton*, 9 Allen, 102; *Regan v. Howe*, 121 Mass. 424."

MAY DAMAGES BE RECOVERED FOR PHYSICAL INJURIES RESULTING FROM FRIGHT CAUSED BY DEFENDANT'S WRONGFUL ACTS.

This question has thrust itself upon the attention of the courts for the first time during recent years. In the common law as interpreted up to the middle of the present century two propositions may be found that bear upon this question: 1. Damages may be recovered for physical injuries resulting from the defendant's wrongful act. 2. Damages may not be recovered for fright alone resulting from defendant's wrongful act. One line of authorities in considering the present subject has invoked the first proposition, and holds that when physical injuries proximately result from the defendant's wrongful act damages may be recovered, even though fright intervenes between the act and the injury. Another line of authorities hold that damages cannot be recovered for physical injuries where fright intervenes between the act and the injury. They cite the second proposition and say that if fright cannot form the basis of an action, it is obvious that damages cannot be obtained for physical injuries resulting from fright. The reasons for not awarding damages for fright alone apply, so these authorities say, to prevent damages being awarded where fright intervenes between the wrongful act and the injury. The injury could be easily feigned, and the damages would rest upon mere conjecture or speculation. To illustrate the positions and reasons of these two lines of authorities six typical cases have been chosen for especial discussion. But first let us mark with precision the boundaries of the question to be considered: 1. All authorities agree in awarding damages where the act causing injury was done with gross carelessness or negligence or recklessness showing utter indifference to the injuries that the actor might cause. Therefore, I shall not consider such cases. 2. The question as to recovery of damages for mental suffering alone, not resulting in physical injury, will not be discussed, because it involves many considerations not germane to the present subject. 3. I shall not discuss actions where an intent to cause mental distress is shown or is reasonably to be inferred, such as seduc-

tion, slander, and malicious prosecution, because the right to damages in such actions is unquestioned. 4. Since the courts agree that damages may be recovered where the physical injuries are contemporaneous with the fright, it is not necessary to consider that question.

Cases Holding that Damages are Recoverable.—In *Bell v. Great Northern Ry. of Ireland*,¹ the court, following *Byrne v. Great Southern & Western Ry.* (unreported), held that negligence might cause fright, and such fright might impair the health and bodily structure so that the negligence would be the proximate cause and give rise to damages. The plaintiff, a woman, was a passenger on defendant's train. While climbing a steep grade, the engine to which her car was attached was reversed and allowed to run back down the slope at a high speed, stopping with a sudden jerk which threw the plaintiff down. She saw people jumping out of the windows and heard cries "Jump out or you'll all be killed." Following the accident she suffered much sickness. The jury found negligence on part of defendant and a physical injury resulting to plaintiff. The question before the superior court was, were these injuries too remote because they resulted from fright and did not accompany it? The court sustained the judgment for the plaintiff. *Palles, C. B.*, said: "The jurors, having regard to their experience of life, may hold fright to be a reasonable and natural consequence of such negligence as occurred in the present case. If, then, such bodily injury as we have here, may be a natural consequence of fright, the chain of reasoning is complete." He then said that from the medical evidence in this case the jury might so find. Continuing, he ridiculed the statement that the physical injury must be contemporaneous with the fright or else it would be too remote, saying, "As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneous with its administration." In *Purcell v. St. Paul City Ry.*,² the syllabus written by the court states the opinion as follows: "If the negligence of a carrier places a passenger in a

¹ 26 L. R. (Ir.) 428.

² (1892) 48 Minn. 184, 50 N. W. Rep. 1034.

position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought." The plaintiff was a passenger on defendant's street car line. The persons in charge of the car negligently attempted to cross the defendant's cable car line in front of the rapidly approaching cable train. A collision seemed so imminent that the plaintiff was caused great fright, resulting in a miscarriage and subsequent illness. A general demurrer was filed to the complaint, and the supreme court affirmed an order overruling the demurrer. The opinion was delivered by Gilfillan, C. J., who reasoned as follows: Here is a physical injury as serious as the breaking of an arm or leg. If the defendant's negligence is the proximate cause of the injury then an action will lie. Now, the fright was the cause of the injury, and the defendant's wrong caused the fright. There is no new independent cause between the wrong and the injury. Therefore, the negligence was the proximate cause of the physical injuries. "That a mental condition (such as fright) comes between the negligence and injury does not break the required sequence of intermediate causes." In *Mack v. South Bend Ry. Co.*³ the plaintiff, a fifteen-year old boy, was driving home the cows across the defendant's track, and the mule he rode became unruly. While the boy was endeavoring to pull it off the track the defendant's train struck the mule. Defendant's negligence was shown. The plaintiff threw himself down near the rail. It was alleged that the fright impaired his mind, shocked his nervous system, caused him sickness, and diminished his capacity to work. The lower court refused the defendant's motion for nonsuit. The defendant brought by exceptions this question, among others, to the supreme court: Is a railroad company liable for physical injuries sustained in consequence of fright caused by its negligence? The supreme court sustained the lower court and said: "We are satisfied that the reasoning is in favor of the liability of a railroad in such cases, and, that as a general proposition, it is liable for such injuries when there is a lack of ordinary care."

³ (1898) 62 S. Car. 323, 68 Amer. St. Rep. 913.

Cases Holding that Damages are not Recoverable.—In *Victorian Ry. Comrs. v. Coultas*,⁴ the action arose in the colony of Victoria. The female plaintiff, with her husband, drove up to a railway crossing. The gatekeeper opened the gate nearest them. They drove in and were on the track when the gatekeeper saw an approaching train. As a result of the gatekeeper's negligence in not opening the second gate they barely escaped being struck by the train. Mary Coultas received a severe fright which resulted in sickness. The judgment of the lower court was for the plaintiffs, but this was reversed in the court of appeals. Sir Richard Couch, in delivering judgment, said: "Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, under such circumstances, their lordships think, be considered a consequence, which, in the ordinary course of things, would flow from the negligence of the gatekeeper." The main reasons stated are: (1) That a contrary view would support damages for mental suffering in every case where an accident caused by negligence had given a person a serious nervous shock; (2) that there is no record of a similar action ever having been maintained in an English court; (3) that the cases cited by the plaintiff were distinguishable in that they were cases of palpable injury. This case has been severely criticised. Pallas, C. B., says:⁵ "The first reason seems to assume that injuries other than mental cannot result from a nervous shock, and the third reason seems to imply that injuries resulting from such a shock cannot be palpable." Rumsey, J.,⁶ in declining to follow it, says: "The case seems to have been decided upon the theory that there was no actual physical injury, and for the reason that mental injuries alone were not the subject of an action." No authorities are examined in the case, and there is not much discussion. It is followed in *Henderson v. Canada Atlantic Ry. Co.*⁷ as binding upon that court, being the decision of the ultimate court of appeal for Ontario; but

⁴ (1888) 13 App. Cas. 222.

⁵ *Bell v. Great Northern Ry. Co.*, 26 L. R. (Ir.) 428 (1890).

⁶ *Mitchell v. Rochester Ry. Co.*, 30 Abb. N. Cas. 362 (1893).

⁷ (1898) 25 Ont. App. 437.

Victorian Ry. Comrs. v. Coultas is not followed in *Bell v. Great Northern Ry. Co.*, nor in the recent English case of *Wilkinson v. Downton*.⁸

In *Mitchell v. Rochester Ry. Co.*⁹ plaintiff was about to board one of defendant's street cars when one of its horse cars came down the street and turned so that plaintiff stood between the horses' heads when they were stopped. From her great fright and excitement plaintiff became unconscious and miscarriage resulted. The question is whether the plaintiff is entitled to recover for the defendant's negligence, which occasioned her fright and alarm, resulting in the injuries already mentioned. The lower court nonsuited the plaintiff. The supreme court held that it was error to nonsuit and granted motion for a new trial.¹⁰ Rumsey, J., after considering a number of cases, said, in delivering the opinion of the supreme court: "I cannot discover any principle which will enable one to say that where the negligence produces a mental condition which necessarily causes physical injury, the negligent person should not be liable to the same extent as though he had brought into existence a physical condition which did the same thing." The court of appeals reversed the decision of the supreme court and sustained the lower court. It reasoned substantially as follows: 1. The most reliable and best considered cases, as well as public policy, justify a non-recovery in this action. 2. It is admitted by the plaintiff that no recovery can be had for mere fright. If fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. 3. If recovery is allowed in this case, it will result in a flood of litigation where the injury complained of can be easily feigned and where damages must rest upon mere conjecture or speculation. 4. Plaintiff's injuries do not fall within the rule as to proximate damages. They are plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which defendant had no control.

These reasons do not hold water. The fol-

lowing three cases cited to sustain the first reason are not directly in point: In *Lehman v. Brooklyn City Ry. Co.*,¹¹ the facts in the report do not charge any negligence on behalf of the defendant. When the element of negligence is eliminated we have "*damnum absque injuria*," and no action lies. We have already discussed *Victorian Ry. Comrs. v. Coultas*. It differed from *Mitchell v. Rochester Ry. Co.* in that plaintiff in the latter case received a "palpable" physical injury, not merely a "serious nervous shock." The case of *Ewing v. Pittsburgh, C., C. & St. L. Ry. Co.*,¹² seems only to hold that mere fright, unaccompanied by bodily injury, cannot constitute a cause of action. The court says that " * * * we know of no well considered case in which it has been held that mere fright, unaccompanied by some injury, to the person, has been held actionable. It is plain from the plaintiff's statement of her case that her only injury proceeded from fright, alarm, nervous excitement and distress. * * *" Considering the second reason put forward by the court, I fail to see much force in it. If it is "obvious" that no recovery can be had in such cases, why did the New York Supreme Court,¹³ and the supreme courts of Minnesota,¹⁴ California,¹⁵ South Carolina,¹⁶ Texas,¹⁷ and the Irish Court of Appeals¹⁸ fail to perceive it in the cases above discussed. The elements necessary to sustain a tort action are: 1. Legal wrong. 2. Legal injury. The miscarriage here is the legal injury, and the defendant's negligence in driving is the legal wrong. The fright is an intermediate dependent cause set in motion by the negligence. It is not the basis of the action. Suppose for example that the defendant's negligence in driving had made some other team run away and this runaway team had physically injured the plaintiff. The runaway team would be an intermediate cause the same as fright in the case at bar. The

¹¹ (1888) 47 Hun, 355.

¹² (1892) 147 Pa. St. 40.

¹³ (1893) 30 Abb. N. Cas. 362.

¹⁴ *Purell v. St. Paul City Ry. Co.*, 48 Minn. 134 (1892).

¹⁵ *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668 (1896).

¹⁶ *Mack v. South Bend Ry. Co.*, 52 S. Car. 328 (1898).

¹⁷ (1890) 76 Tex. 210.

¹⁸ *Bell v. Great North. Ry. Co.*, 26 L. R. (Ir.) 423 (1890).

⁸ (1897) 2 Q. B. 57.

⁹ (1896) 151 N. Y. 107, 87 L. R. A. 781.

¹⁰ This opinion is reported in 30 Abb. N. Cas. 362.

fact that the mere running away of the team might furnish no cause of action would not bar an action for the physical injuries resulting from the runaway.

In *Braun v. Craven*,¹⁹ the tenant, a sister of the plaintiff, was about to move. The defendant landlord came to his tenant's house, found plaintiff packing the goods, told her with frantic gesticulation and in a loud voice: "Don't you move. I will have an officer here in five minutes to stop these goods," and then left to bring an officer. The gesticulation and language conveyed no threat to the plaintiff, but were directed to her sister's goods. Plaintiff was frightened and sickness resulted. Trespass on the case for negligence was brought and damages were awarded plaintiff in the lower court. The appellate court reversed the decision,²⁰ and the supreme court affirmed the appellate court's judgment. The decision was based on the fact that the plaintiff's diseased condition was not a proximate and natural result of the defendant's act. "Proximate damages," says Mr. Justice Philipps, in delivering the opinion of the court, "are such as are the ordinary and natural results of the omission or commission of acts of negligence and such as are usual and might have been reasonably anticipated." He then considers the act of the defendant and says: "These acts could not in the ordinary course of things have been seriously anticipated to cause a diseased condition of the appellant." This decision appeals to me as a just one, but the grounds on which it is based are not so satisfactory. I think that Mr. Justice Sears was right when, in delivering the opinion of the appellate court, he said that it is not necessary in disposing of this case to decide whether physical injury resulting from fright caused by negligence, but without impact, is ground for action. The supreme court, however, does discuss that question at length. In a majority of the cases cited mental anguish and fright alone existed without accompanying or resulting physical injury. *Purcell v. St. Paul City Ry. Co.*,²¹ and *Bell v. Great Northern Ry. Co.*,²² are criticised as being in

conflict with the weight of authority and as disregarding the rule "that before a plaintiff can recover he must show a damage naturally and reasonably arising from the negligent act and reasonably to be anticipated as a result." This criticism seems to be somewhat strained.

The instruction to the jury which the superior court sustained in the *Bell* case was that if the injury to her health was, in the jury's opinion, the reasonable and natural consequence of such fright, and was actually occasioned thereby, damages for such injury would not be too remote. To my mind the words "reasonable and natural consequence" in that instruction contain the same test of proximate cause that Mr. Justice Philipps expresses by a consequence "reasonably to be anticipated as a result." The court concludes its discussion of the *Purcell* and *Bell* cases with this hypothetical case: "Two trains might be passing on a double track road, one carrying passengers and the other freight, and at the moment when the engine of the freight train is immediately opposite a passenger car it might become necessary to sound a whistle, whose effect might be to startle and greatly frighten a nervous person in the passenger car, and the fact that the whistle unexpectedly sounded would be calculated to startle and frighten a nervous person, and that such fright might produce a nervous shock that would cause physical injury, under the principle announced in the *Purcell* and *Bell* cases, *supra*, would authorize a recovery." It is difficult to understand how the principle of the *Purcell* and *Bell* cases would authorize recovery in this hypothetical case. The sounding of a whistle is a necessary act, no negligence is present. The sounding of whistles like the rumbling of passing trains may reasonably be said to be within the contemplation of every passenger on a steam railway. Risks resulting from such noises are assumed by the passenger. No recovery can be had because it is a case of "*damnum absque injuria*." In the *Purcell* case, on the contrary, negligence was present and was admitted by demurrer; and in the *Bell* case the contention as to lack of negligence was abandoned by defendant's counsel.

Where a Wrongful Act Causes Fright, Which Results in a Physical Injury, Such In-

¹⁹ (1898) 175 Ill. 401.

²⁰ 73 Ill. App. 189.

²¹ (1892) 48 Minn. 134.

²² (1890) 26 L. R. (Ir.) 428.

jury may be the Proximate and Natural Result of the Wrongful Act.—That a defendant's wrong may cause fright is an uncontroverted fact. That bodily injury may result through fright is also undeniable. Medical science speaks in positive terms upon this matter. Miscarriage and abortions result through great fright or terror so frequently that great care is taken to guard a pregnant woman from their effects.²³ Death sometimes occurs through fright. In Taylor's Medical Jurisprudence a case is mentioned where a woman was frightened and died within two days as a result of the fright.²⁴ The same author farther says: "Persons have died in railway collisions (from no physical injury but purely from shock to the system," and cites an instance where a woman died in a railway collision, but on *postmortem* examination there was no appearance of external or internal violence. Changes in the circulation of blood, weakening of the nervous system, and impairment of the heart action are other results.²⁵ "A person who receives a serious shock to his nervous centers, resulting in a genuine and grave neurasthenia, is rarely the same person afterwards."²⁶ It is shown that violent emotions may result in immediate death or prolonged prostration. Let us consider a hypothetical case. A pregnant woman becomes a passenger on a railway train. She has a right to be carried without any negligence or wrong of the railway company towards her. Through the company's negligence a collision occurs. She is in a wrecked car, the wreck catches fire, she sees others burning to death around her and is in imminent peril of burning to death herself. After ten minutes she finds a way of escape and walks out uninjured, but as a result of the great fright miscarriage ensues and she suffers a long sickness. She asks for damages. I see no good reason why such physical injuries would not be proximate results of the defendant's wrongful act. The wrong is a sufficient cause to produce the injuries and they would

not have occurred without that wrong. There is no independent cause intervening between the defendant's wrong and the injuries. The mental condition, fright, that comes between is clearly set in motion by the defendant's wrong. The medical authorities that I have consulted and the judgment of the ordinary unprofessional man, I think, would concur in considering the miscarriage and sickness as results of the wrong that would reasonably have been anticipated, *i. e.*, natural results.

One can easily conceive of cases where fright, physical injury, and a wrong exist without the injury being a proximate and natural result of the wrong. But can a court say, as a matter of law, on facts like the hypothetical case above mentioned, that the injuries cannot result proximately and naturally from the wrong? Allen, J., answers that question in these words:²⁷ "A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences (physical injuries) may not flow proximately from unintentional negligence." Much light is thrown upon the question by the rulings in analogous tort cases. There is a line of decisions holding that if a passenger is placed by carrier's negligence in apparent peril, and for self-preservation endeavors to escape it by leaping from a car or coach and thereby is injured, he may, in the absence of contributory negligence, recover for the injury, though if he had remained in the car or coach he would not have been injured. In these cases there is a mental condition, usually fright, intervening between the negligence and the injury, but it does not defeat the action.²⁸ A long line of decisions hold that negligent acts of a railway company, such as unnecessary and excessive whistling or letting off steam, may be the proximate cause of injuries resulting through a runaway horse, and damages have been awarded for such injuries.²⁹ Now, if the

²³ Whitehead on Abortion and Sterility, 204; Homeopathic Journal of Obstetrics, vol. 1, 244, 245.

²⁴ Medical Jurisprudence by A. S. Taylor (1897), 12th Amer. from the 12th Eng. Ed., 315 *et seq.*

²⁵ Osler's Principles and Practice of Medicine, 1132 (1899); Park on Surgery, vol. 1, pp. 230-1 (1896).

²⁶ Hamilton and Godkin, A System of Legal Medicine (1st Ed.), pp. 297, 309 (1895).

²⁷ Ephland v. Mo. Pac. Ry. Co., 57 Mo. App. 147 (1894); Spade v. Lynn & Boston Ry. Co., 168 Mass. 258 (1897).

²⁸ Jones v. Boyce (1816), Stark. 493, 2 E. C. L. 189; Stokes v. Saltonstall, 13 Pet. (U. S.) 181 (1839); Buel v. N. Y. Cent. Ry. Co., 31 N. Y. 314 (1865); Wilson v. North. Pac. Ry. Co., 26 Minn. 278, 3 N. W. Rep. 333 (1879).

²⁹ Manchester, S. J. & A. R. Co. v. Fullerton, 108 Eng. Com. Law, 54 (1893); Hill v. Portland &

fright of a horse does not necessarily break the chain of causes between the act and the injury, why should the fright of a human being break that chain of causes? The mere fact that a horse scares at a train and runs away, causing damages, will, of course, not support an action for damages. Other conditions are necessary, *e. g.*, negligence on part of the railroad company. The mere fact that a person is so frightened that physical injury results, will also not support an action for damages. But that the injuries resulting through the fright of a human being may proximately result from a negligent act seems as clear as that injuries in a runaway accident may proximately result from a railway company's negligence. Other decisions that bear out this line of reasoning are cited in the note.³⁰ The objection has been urged in some cases that these injuries following fright result rather from the nervous temperament or peculiar sensibility of the plaintiff, than from the defendant's wrong.³¹ It is true that the physical constitution of the plaintiff plays an important part in personal injury cases. A blow that breaks the arm of a woman might not harm the arm of a prize fighter. Blows of equal intensity might fall upon the heads of two persons and result in death to one and only in temporary pain to the other. The fright that harms a woman for life might not injure a pugilist. Under the same conditions, one person may be frightened so that death results while another experiences but a temporary scare. But when an act is shown to be negligent and wrongful, we see no reason why a victim should be refused damages because he is delicate or weak. Have not such persons as much right to be protected as others? In analogous cases the courts have protected them.³² In the decision just cited the ques-

tion of proximate cause has been held one of fact for the jury, and I consider that holding to be in accord with the weight of authority. Modern medical science declares in the plainest language that physical injuries may result from acts through mental shock where there is no physical impact. This has become a matter of common knowledge. Is it not flying in the face of reason and knowledge for a court to say, as a matter of law, that physical injuries can proximately result from a wrongful act only through physical impact.

The Rule Allowing Damages Can Be Satisfactorily Administered in Practice.—

An objection of greater force against the compensation in damages of physical injuries resulting through fright is that a rule allowing them cannot be satisfactorily administered in practice, and would result in a flood of litigation. The first consideration that presents itself is that the degree of such injuries is difficult of ascertainment. This objection is common to all physical injuries whether resulting from physical impact or fright. If compensation is only to be allowed for those injuries capable of accurate estimate, all physical injuries will be excluded.³³ "The law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree."³⁴ As the law is well settled that damages resulting from physical injuries can be ascertained, the objection falls to the ground as far as the courts are concerned. It is no more difficult to ascertain the degree of a physical injury resulting from mental shock than of an injury resulting from physical impact. Mis-carriage resulting from fright, for example, can be compensated as satisfactorily as miscarriage resulting from a blow on the body. In *Mitchell v. Rochester Ry. Co.*,³⁵ it is urged against this rule that such injuries are easily feigned. Physical injuries resulting from either impact or fright may sometimes be feigned,³⁶ but the courts have never seen

Rochester R. Co., 55 Me. 438 (1867); *Stott v. Grand Trunk Ry.*, 24 U. C. C. P. 347 (1874); *Indianapolis Ry. Co. v. Boetcher*, 131 Ind. 82 (1891); *North. Pac. Ry. Co. v. Sullivan* (1892), 53 Fed. Rep. 219; *Penn. Ry. Co. v. Barnett* (1868), 59 Pa. St. 269; 3 Elliott on Law of Railroads (1897), sec. 1264.

³⁰ *Hill v. Kimball*, 75 Tex. 210 (1890); *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668 (1896); *Houston, etc. R. Co. v. McKenzie* (Tex.), 41 S. W. Rep. 831 (1897); *Wilkinson v. Downton*, 2 Q. B. 57 (1897); *Pugh v. London, etc. R. Co.*, 2 Q. B. 248 (1896); *Oliver v. Town of Laval*, 36 Wis. 592 (1875); *Fitzpatrick v. Great Western R. Co.*, 12 U. C. Q. B. 645 (1855).

³¹ *Braun v. Craven*, 175 Ill. 401 (1898).

³² *Allison v. C. & N. W. R. Co.*, 43 Iowa, 274 (1875);

McNamara v. Village of Clintonville, 62 Wis. 207 (1885); *Louisville, etc. R. Co. v. Falvery*, 104 Ind. 409 (1885); *Brown v. Hannibal & St. Joe R. Co.*, 66 Mo. 588 (1877).

³³ *Sedgwick on Damages*, sec. 46.

³⁴ *Ballow v. Farnum*, 11 Allen (Mass.), 73, 77 (1865).

³⁵ (1896) 151 N. Y. 107.

³⁶ *Accident and Injury* (1899), Pearce Bailey. In this work some fifty three pages are devoted to this subject of malingering. Pages 359 *et seq.* present

in this fact a sufficient cause to refuse all damages for injuries resulting from impact, and I see no good reason that it should be considered a cause to refuse all damages for injuries resulting from fright. There are very few, if any, injuries resulting either from impact or fright that can be feigned so as to deceive medical examination. Death from fright could not well be feigned, neither could miscarriage, defective heart action, nor changes in the temperature of the body. Whether the injury has been proven, and whether it is feigned, are questions of evidence for the jury. When applied to purely mental injuries this objection has weight, but when applied to physical injuries it falls, because the rule allowing the jury to judge of the existence of physical injuries is well established. Some courts have intimated that a flood of speculative litigation would follow the adoption of this rule. But in jurisdictions that have adopted it, the threatened flood has never come. Neither the courts or the legislatures have shown any desire to change the rule. Why should there be a flood of speculative damage suits? Why should miscarriage or death resulting through fright be the subject of speculation more than miscarriage or death through bodily impact? Admitting that the adoption of this rule may, in any small degree, tend to increase litigation, this affords no good reason for its non-adoption. Litigation is visibly increased by the rule that a party to a contract is liable in damages for the breach of it, but that fact is no good reason that the rule should not exist. The courts must protect rights, even though that protection involves litigation.

An examination of analogous tort cases in which damages are awarded will throw light upon the question whether this rule can be satisfactorily administered in practice. There is a long line of cases holding that damages may be collected from a telegraph company for mental suffering independent of physical injury where the company has been negligent in delivering messages.³⁷ A long line of de-

some very excellent illustrations of simulated physical injuries. They are injuries alleged to result through impact, not through fright. At page 307 the author says that if a careful examination is made, the "chances for successful simulation are always small."

³⁷ So *Relle v. Telegraph Co.*, 55 Tex. 308 (1881); *Mentzer v. W. U. Telegraph Co. (Iowa)*, 62 N. W.

cisions cited *supra* hold that where a railroad company by negligent acts, such as unnecessary and excessive whistling or letting off of steam, frightens a horse so that it runs away and causes damage, the railroad company is responsible in damages. Will not the reasoning of these cases apply to the question before us? Damages are not given each time a horse is frightened by a train. Damages are not given each time a horse is frightened by a train and runs away causing injury. But when (a) the horse is frightened so that it runs away and causes damage, (b) as a result of some negligent act of the railroad company, (c) and the act is the proximate cause of the injury, (d) there being no contributory negligence, then damages are awarded. Now, no court would award damages whenever a person is frightened, nor would any court award damages each time that fright occasions physical injury, but when the facts of a particular case show (a) that a person has been so frightened as to cause him physical injury, (b) the fright and injury resulting from the defendant's negligence, (c) and being a proximate result of the negligence, (d) no contributory negligence being present, why should not damages be allowed? Some courts seize upon a very nominal physical injury to award damages for mental suffering.³⁸ A sense of insult or indignity, mortification or wounded pride is the subject of compensation, as where one is wrongfully ejected from a train.³⁹ A widow may recover damages for injury to the feelings and mental suffering against one who unlawfully mutilates her former husband's body, although no actual pecuniary loss is shown.⁴⁰ There is a class of cases on the border land between mental and physical injury where some difficulty may be had in administering this rule.⁴¹ These cases involve the simple question only,

Rep. 1 (1895), and cases there cited.

³⁸ *Buchanan v. N. Jersey R. Co.*, 52 N. J. L. 265 (1890); *Warren v. Boston & Me. R. Co.*, 163 Mass. 484 (1895); *Canning v. Williamston*, 1 Cush. (Mass.) 451 (1848).

³⁹ *Shepherd v. C., R. I. & P. R. Co.*, 77 Iowa, 54 (1889); *Curtis v. Sioux City & H. P. R. Co. (Iowa)*, 54 N. W. Rep. 339 (1893). A sense of shame and humiliation is the subject of damages. *DeMay v. Roberts*, 46 Mich. 160; *Stutz v. Northwestern R. Co.*, 73 Wis. 147 (1888).

⁴⁰ *Larson v. Chase*, 47 Minn. 307, 50 N. W. Rep. 238 (1891).

⁴¹ (1896) 7 App. D. C. 507.

is the injury sustained mental or physical? That this question may in some cases be a close one affords no reason to refuse damages where physical injury does clearly exist. The question whether murder is justifiable or not is sometimes equally close, but that fact affords little reason for refusing punishment where murder clearly exists. Many of the authorities frequently cited as refusing damages for physical injuries resulting through fright hold simply that damages for "pain of mind" should not be allowed.⁴² These cases, although decisive of the question whether damages may be recovered for nervous or mental shock, do not consider the present proposition. "Fear taken alone falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects."⁴³ When the physical effects are present, as the the question at bar postulates, these cases afford no reason why damages should not be awarded.

Summary.—In closing let us review the conclusions we have reached: 1. The weight of authority holds that physical injuries may proximately result from a wrong through fright. 2. Damages for physical injuries resulting from fright are measured by exactly the same standards that the common law has used for centuries in measuring damages for physical injuries resulting through impact, therefore they are not vague, or shadowy, or sentimental. 3. Physical injuries resulting through fright are no more easily feigned than those resulting from impact. 4. In jurisdictions where damages for physical injuries resulting through fright have been allowed no injurious consequences such as speculative litigation have followed. 5. The adoption of the rule allowing damages will render no defendant liable who has not committed a wrong and caused the plaintiff physical injury. It will give damages to no one except his rights have been invaded and physical injury has been inflicted upon him. It will not injure but protect the public. To my mind it is an eminently just rule.

J. F. D. MEIGHEN.

⁴² *Lynch v. Knight*, 9 H. of L. 577 (1861); *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224 (1870); *Wyman v. Leavitt*, 71 Me. 237 (1880); *Canning v. Williamston*, 1 Cush. (Mass.) 451 (1848); *Ewing v. Pittsburgh*, etc. R. Co., 147 Pa. St. 40 (1892); *Kalen v. Terra Haute*,

etc. R. Co., 18 Ind. App. 202, 63 Am. St. Rep. 343 (1897).

⁴³ *Pollock on Torts* (Amer. from 3d Eng. Ed.), 67.

ELECTRICITY—NEGLIGENCE—LIABILITY OF LIGHT COMPANY—NOTICE TO AGENT.

NATIONAL FIRE INS. CO. v. DENVER CONSOL. ELECTRIC CO.

Court of Appeals of Colorado, February 11, 1901.

1. Where plaintiff hired contractors to wire its property for electric lighting, and afterwards contracted with a lighting company to furnish a current to light the building, the lighting company was not responsible for injury from fire caused by negligent wiring.

2. Where plaintiff hired contractors to wire its property for electric lighting, a company which afterwards furnished a current to light the building was not chargeable with notice of the negligent manner in which the wiring was done, merely because a superintendent of construction of such company casually saw the work as it was being done; it not appearing that he was an officer or director of the company, or examined the wire, or was impressed that the work was being done negligently, or that he was still employed for the company when the loss from alleged negligent wiring occurred.

BISSELL, P. J.: This is a case without a prototype. We have been cited to none at all similar, nor to any precedent which in our judgment even remotely tends to uphold the cause of action stated. This neither demonstrates nor tends to demonstrate that the plaintiffs have suffered no wrong, nor that they are without a remedy for that stated, but it leads the court to be somewhat critical in the examination of the positions which the appellants have assumed.

The suit was begun by some ten or a dozen insurance companies against the Denver Consolidated Electric Company to recover the amount which they had paid to the depot company for a loss. In March, 1894, fire broke out in the Union Depot, and pretty nearly destroyed one end of the building, and the insurance companies were compelled to pay some \$60,000 for the loss. After paying it they brought this suit against the electric company for reimbursement. Disregarding any discussion of the query whether the insurance companies could maintain such a suit under any circumstances, even though the electric company had been responsible for the fire, we shall put the affirmance on the precise ground that they failed to make any proof or offer any evidence which tended, save most remotely, to establish the cause of the fire. The companies likewise failed to prove or offer to prove, or submit evidence which tended to prove, that the electric company was in any wise responsible for the loss. In other words, they wholly failed to produce any proof which would lay the responsibility for the fire on the electric company. The complaint stated several causes of action, but we shall dismiss the first two because no evidence

was offered about them. These related to the careless and negligent manner of the wiring, the unsafe and dangerous character of the wire used, and charged that the fire was caused by this negligence. When it came to proof, however, there was nothing tending to show that the electric company had anything to do with the wiring or with the inspection of the wires, or that it made any contract or entered into any engagement to keep the wires in good repair and in a safe and proper condition. Evidence was offered to the effect that the building was wired in 1888 by the firm of Baxter & Spicer, of Philadelphia, under an employment by the Union Depot Company, and that the electric light company was not a party to the agreement, and did not execute it. What was done was done by the depot company at their own expense and on their own responsibility. The electric light company, under a contract with the depot company, connected their system with the wiring, and delivered a current for use. This was the extent of the connection between the two companies, and it was simply a delivery of a current for lighting purposes by one, and the payment of an agreed price therefor by the other. Whatever, therefore, may have been the character of the wiring or the nature of the work, it was a matter with which the electric light company was not chargeable. If it was negligently done, the negligence was the negligence of the depot company which put it in, or of the firm which that company hired, whose negligence would, of course, be the negligence of the depot company. There was a total absence of evidence which sustained or which tended to sustain any knowledge on the part of the electric light company of the character of this wiring. The only evidence which they presented on this subject was that of Stern, who testified that in 1888, when this wiring was put in by Baxter & Spicer, he was the superintendent of construction for one or more of the companies which by consolidation became the Denver Consolidated Electric Light Company; that casually, from time to time, he saw this work as it was done by Baxter & Spicer,—saw the nature of the wiring and the method of its attachment. He was not very precise or positive in regard to its character. In other words, at the time the wiring was put in he does not appear to have been particularly impressed with any negligence on the part of Baxter & Spicer, nor with the defective character of the wiring, or the unskillful method of its attachment. At all events, if he was so impressed he said nothing about it. There was no evidence that he stated what he saw to any of the officers or directors of the electric light company. So far as we can see, he was an employee occupying perhaps a controlling position with reference to other workmen in the service of the electric light company, being the superintendent of construction; but he was not an officer of that company, nor was he a director in the corporation. He never examined the building to determine whether the wiring

was adequate, nor whether it was properly put in. His observation was simply casually made as he went about the city looking after the construction of the plant of the electric light company, and the connections which were to be made with the various buildings in the process of construction. There was also a good deal of evidence offered, and some offered which was refused, tending to show that the wiring was, at the time of the trial, at least, and possibly at the date when it was put in, inadequate and unsafe. It was what is known as "underwriter's wire," which the experts testified was not the best kind of wire to be used about a building of that sort, though it is entirely safe if perfectly insulated. There was evidence which tended to show that the wires were run through holes in the rafters, and then along laths or slats, and had more or less connection with the woodwork. There was testimony which tended to show that, after the wiring had been put in, the wires had been unduly loaded with lights, which, as the experts say, tends to concentrate the heat to the largest wire, and has a tendency to unduly increase the heat at given points, and, if at those points it strikes the wood, may char and ultimately cause a fire. We have not attempted to state all the evidence in this direction, but this is substantially the purport and tendency of the proof which was offered.

There is another basis on which the appellants attempt to rest their cause of action,—the circumstances of the fire. There was proof that in the evening, about 11, a chandelier which was unlighted in the ladies' waiting room fell. The depot master immediately telephoned the electric light company to send a man down. For what purpose, and what sort of a person he wanted sent, the evidence does not disclose. There was nothing to show that he called for an electrical expert, or a man who was competent to determine whether the condition was a dangerous one. A man reported, presumably and ostensibly from the electric light company. He examined the chandelier, and went up into the upper story, and found the fuse had burned out which furnished the light in that section of the depot. He apparently made no extensive examination of the condition of the wiring. He was not requested by the depot master to do otherwise than to ascertain the cause for the fall of the chandelier and the trouble with the lights, and to see that in this respect everything was rendered safe. When he came downstairs the depot master inquired of him whether there was any danger, and he replied "No," and stated that it would be difficult to make the repair that night, but he would come down in the morning and repair the wire and fix up the lights. With this statement the depot master was satisfied, the employee went away, and within less than an hour thereafter a fire broke out. We do not know, nor are we advised by the record, whether this was caused by the electric current. We do not know

that the insulated covering on the wire in one of the rooms was being consumed, to the observation of one of the employees of the railroad company; and we do not know from the expert's testimony that this indicated that some fuse had failed to burn out, and that there was an undue current in that locality. Otherwise than by a sort of guess, there is nothing to show that the fire came from the electric current, although, for the purposes of this decision, we are quite willing to assume that it did.

There are many reasons why this judgment in favor of the electric light company must be sustained. There was no competent evidence which established any responsibility on the part of the electric light company for the original wiring or for its inspection. The wiring was done by a concern with which the electric light company had no connection. The depot company hired them and paid for the work, and they, and they only, were responsible to the depot people for the character of what was done. Manifestly, under these circumstances, the electric light company cannot be holden for any defect either in the character of the material used, or in the negligent and unskillful performance of the work. To state the evidence and to state the situation is to dispose of this proposition. The only theory on which it is sought to hold the electric light company is that they had knowledge of the insufficient character of the wire and the defective construction, and, being advised of the dangerous character of the current which they were to supply, they were bound to advise the depot company about it, and had no right to make the connection and turn the current on without advising the depot company of the danger attending the use of electricity for lighting purposes, and especially about the danger of turning on the current where the wiring was of the sort and the work of the description which the proof disclosed. We do not think either proposition can be maintained, nor that there is anything in the case which justifies the application if defensible. In the first place, there is nothing which demonstrates that the electric light company had any knowledge either of the defective character of the wiring or of the negligent or unskillful construction. Stern's knowledge is not the knowledge of the electric light company, nor can any information which he acquired, in view of the way in which he acquired it, be imputed to that corporation. He was not the general agent of the corporation. He was an employee charged with certain duties, and, though those duties were of a supervisory nature, they in no sense made him the representative of the corporation, so that it would be charged with the knowledge which he casually acquired in going about the city. Since there was no connection between the Union Depot Company and the electric light company, and because the work was being done by an outside firm on employment by the depot corporation, we think it quite clear that the knowl-

edge acquired by Stern was not knowledge brought home to the corporation. We do not need to discuss or consider what the rule is in those cases where knowledge has once been brought home to a corporation or to an agent of a corporation, and the event out of which their responsibility is supposed to grow occurs long subsequent to the acquisition of the knowledge. This is a matter which admits of discussion, but we are not required to express an opinion about it. It is always true that a principal is not bound by knowledge acquired by an agent unless that knowledge is present to the agent's mind at the time of the transaction out of which the responsibility grows. We need only cite one authority to it. *Campbell v. Bank*, 22 Colo. 177, 43 Pac. Rep. 1007. This case is not directly in point, nor has our attention been called to one which seems to be entirely applicable. If Stern ever acquired any knowledge, it was entirely unofficial, and it was not at the time of a transaction between the Union Depot Company and his employers. So far as the evidence discloses, he never communicated the information to any of the officers or directors of the corporation. The fire happened years after the wiring was done, and years after the connection was made. It is not certain that Stern was in the employ of the electric light company when the fire occurred. To attempt to charge the electric light company with responsibility because of this casual knowledge, which was not communicated, and of which they were not advised when they made the connection and delivered the light, and of which they never had information, so far as the proof shows, would carry the doctrine of the responsibility of the principal because of the knowledge of his agent to a limit which is not recognized by any of the cases, and which is not justified by any legal principle. We do not assent to the position which the appellants take,—that the electric light company had no business to deliver the current without informing the depot company of the danger attending its use, and particularly of the danger attending its use where the wiring was defective or its construction unskillful and negligent. Where parties undertake to wire their own property, and then apply to a light company to deliver a current to light the building, they must be assumed to take all risks resulting from the character of the wire which is put in the building, and the method of construction which is adopted in putting it in. We do not believe that the principle contained in some cases to which our attention has been called, notably, *Lannen v. Gaslight Co.*, 44 N. Y. 459; *Farrant v. Barnes*, 2 C. B. (N. S.) 553; *Thomas v. Winchester*, 6 N. Y. 397; *Wellington v. Oil Co.*, 104 Mass. 64, is at all applicable. In those cases, it will be observed, the injury was done to an individual because of the undisclosed, dangerous character of the material sold, or the negligent conduct of an agent. They were not cases in which injury was done to property. Be-

sides, the dangerous character of the article was not known, understood, or readily ascertainable by the individual to whom the stuff was furnished. This is, of course, true with reference to explosive oil, with reference to the nitric acid carboy, and with reference to the extract of belladonna. No such condition or circumstances attended the supply of the electric current. It is a matter of common knowledge, and in fact of universal knowledge, that an electric current is dangerous, and must be discreet and prudently handled in order to avoid danger either to life or to property. We are quite ready to concede that, when an electric light company undertakes to supply a dangerous current to a dwelling house or to a building, they are bound to see that the wires they put in and the connection they make are properly insulated and protected, so that no harm will come to the property. Where, however, they are only employed to deliver the current by connection with wiring already made by the individual who owns the property, it seems to us that their responsibility ends when the connection is properly made under proper conditions, and they deliver the current in a manner which will protect both life and property. We do not believe any such responsibility rests on the company as to require them to advise the persons who apply for the connection that they must see to it that the wiring is of a certain class or description, that it is insulated in a particular manner, and that there is no connection between it and the woodwork, and, failing in this, that they will be liable for any damages which may happen because of the negligent or unskillful nature of the construction. When parties wire houses, they are supposed to have done it intelligently, and to have hired competent persons for the purpose, to whom alone they must look in case the work is improperly and unskillfully done.

There is still another reason why the appellants must fail. They did not show that the electric light company was responsible for the conduct of the man who was sent there to look after the property at the time the chandelier fell. There is no proof that the depot master had any right to either inquire of the employee, or rely on his answer, in settling the question of the presence or absence of danger. The chandelier fell, and naturally put out some of the lights, and they telephoned for a man to come down and attend to the matter. This he did, and when he went up to the locality of the accident he discovered that the fuse had burned out, which put out the light, and probably caused the destruction of the wire, which permitted the chandelier to fall, though the latter proposition is not clear. When he came down he was inquired of by the depot master whether there was any danger, to which he responded "No." There is nothing which demonstrates that he could bind the light company by this declaration. A workman sent to repair is not necessarily one who is competent to

advise. It might be true the electric light company would be quite willing to be held responsible for the work done by the employee, or held responsible for his examination as to what ought to be done in an emergency of that description. This, however, in no manner establishes the fact that the company would be willing to be held responsible, or ought to be held responsible, for a statement that the general situation was such as to be free from danger. This would assume a knowledge on his part of the condition of the wiring all over the building, and would presume an examination of the general situation to enable him to answer that direct question, and so answer it that the depot company could rely on it, and in case of failure hold the electric light company responsible. We do not believe his agency or his relations to the company were sufficiently established to bind the company by his declarations. Even though this position be not well taken, it is true, on the evidence, that the condition was not such as to require that the current should be shut off when the employee went there. It is quite possible that his statement was absolutely true. It is likewise possible that there may have been elsewhere in the building defective material or negligent construction which resulted in the fire. It is equally possible, and the contrary presumption may not be indulged in under the evidence, that the fire did not break out because of the accident, or of anything resulting from it, but because of the condition which had theretofore existed, and which culminated when the connection with the chandelier broke. The testimony of the experts is to the point that where the insulation is defective and the wiring is attached to woodwork, with an excess current, it may char and break out in fire. This may be precisely what happened. There is nothing which tends to prove that the fire was caused by the breakage which the employee was sent to investigate and repair. We think, however, the affirmance of the judgment can be very safely rested on the broad proposition that the electric light company had nothing to do with the furnishing of the wiring which was put into the building, or with its attachment to the structure, and, if any injury happened or a fire broke out because of defective wiring or negligent construction, it is a matter for which that corporation cannot be held responsible. The depot company hired an independent firm to put it in, and neither they nor anybody in privity with them can look to anybody except the contractors who did the work. We can discover nothing in the proof which would warrant us to disturb the judgment, which will accordingly be affirmed. Affirmed.

NOTE.—Recent Cases on What Constitutes Negligence on the Part of Electric Companies in Furnishing Electricity and Providing Apparatus for Its Use.—The court in the principal case does not mistake the facts when it says that it is a case "without a prototype." We have searched diligently the reports

to find even a similar statement of facts, but without success. This lack of precedent is due of course to the newness of the subject-matter, and will undoubtedly disappear in not many years with the multiplication of electrical appliances and their more general use in shop and home. The decisions now being handed down on this subject therefore, have their peculiar importance wrapped up in the fact that they have the whole of this wonderful subject in a pliable state, so far as its legal aspect is concerned, and the duty is upon the courts of the present day to so shape the law upon this subject as not only to protect the life and property of the citizen from unnecessary danger, but at the same time to guard against placing any unreasonable restrictions, burdens or liabilities upon promoters of this highly valuable invention as would restrict its free development. While there are no cases which the writer has been enabled to find exactly on "all fours" with the principal case, yet there are a few well considered cases of recent date which are interesting and valuable as throwing side light on the question before us. The following decisions have been selected as especially noteworthy:

Persons using electricity must exercise the utmost care to prevent injury, and must protect those possessing less than the ordinary knowledge of its character. *Giraudi v. Electric Co.*, 107 Cal. 120. An electric light company negligently leaving uninsulated joints on its wires 15 inches from a frame, which it had licensed the city to use for attaching its fire alarm wires, is liable for injuries resulting therefrom to an employee of the city working on the frame. *Hillingsworth v. Boston Light Co.*, 161 Mass. 583. That the primary wires of a converter used to change a high tension current to a low tension, placed by an electric light company on a house, which is supplied with electric light, were improperly placed and improperly insulated and exposed to contact by anyone going near it, proves negligence on the part of the company so as to render it liable to a person who while repairing the roof for the owner of the house was injured by coming in contact with the wires. *Ennis v. Gray*, 87 Hun, 353. Proof that a live electric wire belonging to an electric light plant was broken and lying upon the premises of plaintiff in the city so as to endanger his property, and that in attempting to remove it injury resulted to him therefrom, makes out a *prima facie* case of negligence against the company. *Leavenworth Coal Co. v. Ratchford* (Kan., 1897), 48 Pac. Rep. 927. The fact that an electric light company having its wires attached to the roof of a building by permission of the owner has contracted to make all needed repairs to the roof, does not deprive the owner of the right to send men on the roof to make repairs; and the company is liable for an injury resulting to a workman so employed and in the exercise of ordinary care from the negligent attachment of its wires or its failure to keep them properly insulated. *Reagan v. Electric Light Co.*, 167 Mass. 406. An electric company, by consent of a bridge owner, placed over the bridge two wires two feet apart. It did not inform the owner that notwithstanding the insulation of the wires it was dangerous to touch both at once, though it knew that persons while repairing the bridge would be near the wires. Decedent having no expert knowledge of electricity was employed by the owner to repair the bridge. He touched the wires when they were dead, and while he mistakenly supposed they were alive and harmless because of their insulation. Later in the day the

current was turned on, without notice to him, and he touched both wires at once and was killed. Held, that the company was liable. *Perham v. Electric Co.* (Oreg., 1898), 53 Pac. Rep. 14. The court in that case further held that an electric company is bound to exercise the utmost degree of care for the safety of persons liable to come in contact with wires carrying highly dangerous currents. An electric company is not bound to have the "most reliable and best" appliances to discover broken wires to relieve it from liability for injuries occurring from the fall of wires charged with electricity. *Snyder v. Electric Co.* (W. Va., 1897), 28 S. E. Rep. 733. Whether an electric light company was negligent in attaching to an insulator placed upon a house and within reach from a window live wires which are not insulated, is a question for the jury. *Walters v. Electric Light Co.* (Colo. App., 1898), 64 Pac. Rep. 960. An electric light company is liable for injuries resulting from its failure to furnish perfect protection from electric currents at points where persons will probably come in contact with its wires, it not being sufficient to relieve it from liability, that it has exercised the "highest degree of care and skill usually exercised by prudent persons engaged in the same or similar business to keep its wires so insulated as to be reasonably safe and free from danger." *Overall v. Electric Light Co.* (Ky., 1898), 47 S. W. Rep. 442. In an action against an electric light company for the death of a customer caused by her taking hold of an electric lamp in her own house, an allegation that the defendant carelessly and negligently permitted its plant, wires and other conductors and appurtenances used in furnishing light to deceased to become and remain out of repair and without sufficient insulation, so that the current escaped and became grounded and liable to be communicated to persons using lamps, and that through such negligence, without negligence of deceased, she was killed, states a cause of action, since defendant was required to exercise a high degree of skill in delivering such a dangerous element as electricity, and the injury itself furnished a presumption of negligence requiring defendant to show that it has not itself been negligent. *Alton Illuminating Co. v. Foulds*, 81 Ill. App. 322. In this case the court said: "When appellant wired the basement of appellee's house, and agreed to furnish him light for hire, it well knew it was dealing in an element that, delivered in a current of high voltage, such as was carried on its primary wires, was almost certain to bring death to the person who turned on the lamp, if there was a ground of the current on the circuit; hence the law imposes upon it the duty to exercise a high degree of care and skill in the delivery of the element it had contracted for." A. H. ROBBINS.

BOOKS RECEIVED.

A Digest of the New York Code of Civil Procedure. Being a Synopsis of the Chapters of the Code Relating to General Practice, in a Concise and Readable Form. Edited by Chas. W. Disbrow, LL. B., of the New York Bar. Albany, N. Y.: Matthew Bender, 1901. pp. 151. Buckram. Review will follow.

WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACTION.—Death of Plaintiff in Error.—Revival.—A plaintiff in error died pending proceedings commenced by him in this court. On application of his heirs and personal representative, they were substituted as parties in place of the deceased, and prosecuted the proceedings in error to a final termination. Held, that by such action they are estopped from asserting that the judgment which they sought to reverse was not properly revived against them in the court where it was rendered.—*CARR V. FARRELL*, Kan., 64 Pac. Rep. 22.

2. APPEARANCE.—Jurisdiction.—Waiver.—A defendant who appears specially, and moves to dismiss an action against him on jurisdictional grounds, does not thereby enter a general appearance in the case.—*THOMPSON V. GREER*, Kan., 64 Pac. Rep. 48.

3. APPEAL.—Writ of Error.—Supersedeas Bond.—In cases where the statute makes no provision for a supersedeas, or a stay of the judgment or final order, as a matter of right, the trial court may, in the exercise of its discretion, allow a supersedeas or stay, on such terms as it may prescribe for the protection of the parties, pending an appeal to the appellate court.—*IN RE EPLEY*, Okla., 64 Pac. Rep. 19.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Building and Loan Association.—When an action is brought by stockholders in a building and loan association against such association and its assignee for the benefit of creditors, to set aside the deed of assignment for fraud or want of power to make the deed, a settlement between the association and its assignee, satisfactory to both, will not be a settlement as against the complaining stockholders, unless they consent to the same.—*STANDARD HOME & SAV. ASSN. CO. V. JONES*, Okla., 59 N. E. Rep. 885.

5. ATTACHMENT.—Property in Possession of Pledgee.—Property in possession of a pledgee cannot be levied on under attachment for the pledgor's debts, and therefore, where a bank discounted a draft for the price of goods, to which a bill of lading for the goods was attached, the goods, upon a refusal of the consignees to receive them, could not be levied on under attachments in favor of the consignor's creditors, being in the constructive possession of the bank as pledgee, and so such attaching creditors cannot require the bank to look to other property upon which it has a lien for the payment of its debts.—*SABEL V. PLANTERS' NAT. BANK OF RICHMOND*, Va., Ky., 61 S. W. Rep. 367.

6. ATTORNEYS.—Disbarment.—An attorney who converts a client's money to his own use is subject to dis-

barment, notwithstanding he is young and inexperienced, and has repaid the larger part of the deficit.—*PEOPLE V. WALDRON*, Colo., 64 Pac. Rep. 126.

7. BANKRUPTCY.—Discharge in Bankruptcy.—Effect.—A discharge of a debtor in bankruptcy does not extinguish for all purposes a debt upon which it operates, so as to displace the jurisdiction of the State court in a pending action to enforce it. Notwithstanding the discharge, the cause of action to recover the debt continues, unless the bankrupt insists upon his discharge by pleading it in bar of further proceedings in the suit.—*BANK OF COMMERCE V. ELLIOTT*, Wis., 85 N. W. Rep. 417.

8. BROKERS.—Liability to Principal.—Conversion.—A broker who sells his principal's property for one price and reports a less, and converts the difference to his own use, must account to his principal therefor.—*STEARNS V. HOCHBRUNN*, Wash., 64 Pac. Rep. 165.

9. CONTRACTS.—Construction.—Vagueness.—Where a contract provided that, in consideration of plaintiff's assisting a distributing agent of defendants in making a success of their line of cigars in the distributor's territory, plaintiff was to receive a certain commission on all sales, the arrangement to remain in force so long as the goods found a ready sale, the contract was not void for uncertainty on the ground that it was not possible to determine what was meant by "assisting to make a success."—*SUTLIFF V. SEIDENBERG*, Cal., 64 Pac. Rep. 181.

10. CONTRACTS.—Mutuality.—A contract to drill a well until a flow of water is procured, or until the employer orders the work stopped, and which reserves the payment of the compensation until the work is completed, is not void for want of mutuality, in allowing the employer to order the work stopped, and not allowing the contractor the same right; and hence an abandonment of the work by the latter is a valid defense against an order given to the contractor for part of the price, which was assigned to plaintiff.—*WOODWARD V. SMITH*, Wis., 85 N. W. Rep. 424.

11. CONTRACTS.—Principal and Agent.—Work and Labor.—Where defendants' foreman hired plaintiff to work on their building, agreeing to pay \$3 per day, that being what the work was worth, but the foreman was authorized to offer but \$2.50 a day, a judgment allowing plaintiff \$3 per day, in an action to foreclose a lien for his labor, would not be reversed, since if defendants were not bound by the apparent authority of their agent, there was no contract made, and plaintiff was entitled to that amount on quantum meruit; and, in an equity case, the judgment, if right, should be sustained, though rendered on a wrong theory of the law.—*SANDERS V. BARTLETT*, Wash., 64 Pac. Rep. 149.

12. CORPORATION.—Insolvent Corporation.—Assessment by Stockholders.—In an action brought for the purpose of winding up the affairs of an insolvent corporation, an assessment made by the court upon the stockholders of such corporation is a conclusive judicial determination only to the extent that it ascertains the amount of corporate assets and liabilities and declares the necessity for making the assessment ordered.—*COMMONWEALTH MUT. FIRE INS. CO. V. HAYDEN*, Neb., 85 N. W. Rep. 448.

13. CORPORATIONS.—Subscription to Capital Stock.—One cannot withdraw his subscription to the capital stock of a corporation without the consent of all persons who subscribed to such stock prior to such withdrawal.—*CHICAGO BLDG. & MFG. CO. V. LYON*, Okla., 64 Pac. Rep. 6.

14. CORPORATION.—Trusts.—Directors.—Where a corporation is a going concern, though in embarrassed circumstances and in need of ready money, a director may purchase with his own money outstanding obligations of the company, at a discount, for his own use, when he owes no duty to the corporation to purchase for its benefit, and may collect the obligations in full of the corporation.—*GLENWOOD MFG. CO. V. SYME*, Wis., 85 N. W. Rep. 432.

15. **CORPORATIONS—Unauthorized Contract.**—In an action against a corporation to recover on a contract made by the secretary and treasurer of the corporation, the declarations of such officer were inadmissible to prove his authority to make such a contract, where the articles of incorporation and by-laws of the company provided that the board of directors and president were the only officers vested with the general management of the corporation. — **EXTENSION GOLD MIN. & MILL. CO. V. SKINNER**, Colo., 64 Pac. Rep. 198.

16. **CRIMINAL EVIDENCE—Burglary—Tools.**—Instruments not exclusively used for criminal purposes, but of the kind adapted to the commission of a crime with which the defendant stands charged, may be shown to have been in his possession several months before the time of the offense, and may be admitted in evidence on the trial. The facts that such instruments may be also used for lawful purposes, and that they were not recently in defendant's possession, go to the weight, and not to the admissibility of the evidence. — **STATE V. WAYNE**, Kan., 64 Pac. Rep. 69.

17. **CRIMINAL LAW—Blackmail—Evidence.**—Under 4 Mills' Ann. St. § 1304, defining blackmail as the sending or delivering of any writing threatening to accuse another of a crime or misdemeanor, or to expose or publish any infirmities or failings, with intent to extort money, an attorney who sent a fictitious bill for services rendered, the wording of which indicated an intent, unless the bill was paid, to declare the fact that the alleged client was violating the laws of the State, which would tend to disgrace him, was guilty of blackmail, and subject to disbarment. — **PEOPLE V. VARNUM**, Colo., 64 Pac. Rep. 202.

18. **CRIMINAL LAW—Extortion.**—An indictment for extortion, charging threats by defendant to accuse another of a violation of the laws of the United States in sale of cigars, is not demurrable because charging a violation of a federal and not of a State statute. — **PEOPLE V. SEXTON**, Cal., 64 Pac. Rep. 107.

19. **CRIMINAL LAW—Indictment;—Sufficiency.**—The constitution requires that all indictments shall conclude with the words "against the peace and dignity of the State of Ohio," but those words are not required to be at the conclusion of each count of an indictment. — **OLENDORF V. STATE**, Ohio, 59 N. E. Rep. 892.

20. **CRIMINAL LAW—Trial.—Pen. Code, § 1200**, requiring that, before sentencing a defendant, he must be informed of the nature of the charge against him, and of his plea, and the verdict thereon, and be asked if he has any cause why judgment should not be pronounced, is mandatory, and a failure to comply therewith deprives the defendant of substantial rights. — **PEOPLE V. WALKER**, Cal., 64 Pac. Rep. 133.

21. **CRIMINAL LIBEL—Belief in Truth of Articles—Privileged Communications.—Pen. Code, § 244**, provides that a libelous publication is excused when it is honestly made in the belief of its truth, and consists of fair comments on the conduct of a person in respect of public affairs. Defendant was charged with criminal libel in publishing that C, as foreman of a newspaper office, was guilty of misappropriation of funds. Held, that in the absence of proof of the truth of the publication, evidence that defendant believed in good faith that it was true was properly excluded, since, as the publication was not a comment on the conduct of a person in respect of public affairs, belief in its truth did not tend to excuse defendant. — **PEOPLE V. SHERLOCK**, N. Y., 59 N. E. Rep. 880.

22. **CRIMINAL LIBEL—Indictment.**—Where the language used in a criminal libel was actionable *per se*, the information need not allege that it was intended to provoke the wrath of the libeled person or expose him to hatred. — **STATE V. GRINSTEAD**, Kan., 64 Pac. Rep. 55.

23. **DEATH BY WRONGFUL ACT—Jurisdiction—Foreign Statutes.**—In order to give the courts of Ohio jurisdiction to adjudge a cause brought by an admin-

istrator of one who is alleged to have been in the employ of a railroad corporation and killed by its negligence in another State, it must, by force of section 6134a, Rev. St., be shown that such State allows the enforcement in its courts of the statute of this State of like character. It is not sufficient to show merely that the courts of that State entertain actions to recover for wrongful killing in another State. — **WABASH R. CO. V. FOX**, Ohio, 59 N. E. Rep. 888.

24. **DESCENT—Distribution—Imprisonment for Life—Administration.**—Section 5583 of the General Statutes of 1896, which provides that, when a person shall be imprisoned under a sentence of imprisonment for life, his estate, property, and effects shall be administered and disposed of in all respects as if he were naturally dead, does not cast the descent of his property upon his heirs, by the fact of such sentence and imprisonment. — **SMITH V. RECKER**, Kan., 64 Pac. Rep. 70.

25. **DESCENT—Distribution—Remarriage of Widow.**—Burns' Rev. St. 1894, §§ 2575, 2576, provide that a widow, whose husband died, leaving real and personal estate worth not over \$500, on petition may have the whole of such estate set off to her without administration. A widow, having children by her late husband, whose estate was worth less than \$500, had such estate set off to her under the act cited above, and subsequently remarried. After such second marriage the widow and her husband conveyed land which had been set off to her. Held, in an action by children of the widow by her first husband, brought after her death, that she was not prevented from conveying such land by Burns' Rev. St. 1894, § 2641, providing that if a widow shall remarry, holding land by virtue of her former marriage, and there be any children of such former marriage, she may not alienate such land during the subsequent marriage relation, since she did not hold the land conveyed by virtue of her earlier marriage, within the meaning of the statute. — **ODELL V. REYNOLDS**, Ind., 59 N. E. Rep. 846.

26. **DOWER—Forfeiture by Living in Adultery.**—Under Ky. St. § 2183, providing that, if the wife voluntarily "leave her husband," and live in adultery, she shall forfeit all interest in his estate, unless they afterwards become reconciled, and live together as husband and wife, the wife, by living in adultery in the husband's home during his enforced absence, forfeits her right to have either homestead or dower. — **MCQUINN V. MCQUINN**, Ky., 61 S. W. Rep. 858.

27. **EMINENT DOMAIN—Railroads—Right of Way—Appropriation.—Sand. & H. Dig. § 2734**, declares that, whenever any corporation authorized to appropriate private property shall appropriate real estate, the owner shall have an action for damages. Section 2735 provides the measure of recovery in such an action, and section 2736 requires the court to include in the judgment an order condemning the property to the public use to which it shall be appropriated. Held that, where a railroad appropriates land for a right of way within the prescribed limits, the owner may not bring ejectment for damages, the remedy given by section 2734 being exclusive. — **MCKENNON V. ST. LOUIS, I. M. & S. RY. CO.**, Ark., 61 S. W. Rep. 889.

28. **EQUITY—Cancellation of Notes.**—Where one has a plain, complete, and adequate remedy at law for a breach of warranty of a chattel, or for deceit practiced in the sale of the same, either in an action for damages or as a defense to notes given in part payment of such chattel, and there is no allegation in the petition that the vendor, which is the payee of the notes, is insolvent and unable to respond in damages, or that it is about to transfer the notes before maturity to an innocent purchaser, equity will not decree that the notes be surrendered up and canceled, but will not relegate the party to his action or defense at law, so that the issues may be tried by a jury. — **TRIMBLE V. MINNESOTA THRESHER MFG. CO.**, Okla., 64 Pac. Rep. 8.

29. **FORCIBLE ENTRY AND DETAINER—Possession.**—To entitle one to maintain a proceeding of forcible en-

try it is sufficient that the entry was within his boundary, though not within his inclosure, actual possession not being necessary.—*HOWARD V. WHITAKER*, Ky., 61 S. W. Rep. 835.

30. **FRAUDULENT CONVEYANCE**—Death of Grantor—Action by Creditors.—Where the estate of a decedent is insufficient for the payment of his debts, and it appears that before his death he conveyed real estate with intent to defraud his creditors, and that the administrator occupies a position antagonistic to the interests of creditors, and refuses upon their request to institute a proceeding to reach the property fraudulently transferred, a creditor beneficially interested may bring an action to set aside the fraudulent conveyance, making the administrator and other interested defendants.—*BARKER V. BATTEY*, Kan., 64 Pac. Rep. 75.

31. **GIFTS**—Validity of Check.—An instruction, as to the validity of a check given as a gift in the last illness of the drawer, that if he executed and delivered the check to defendant while of sound mind, and without fraud, the gift should not be set aside, is not erroneous, as authorizing the assumption that the execution of the check was sufficient to constitute the gift, in connection with instructions requiring the jury to find that the gift was so intended by deceased, and placing the burden of proving such gift on the defendant.—*FRANTZ V. PORTER*, Cal., 64 Pac. Rep. 92.

32. **GUARDIAN AND WARD**—Death of Ward—Sale.—A guardian after the death of his ward filed his account, and the probate court decreed that the ward's estate was indebted to the guardian. Held, that an order authorizing the guardian to sell the real estate of the ward for such debt was invalid, since on the death of the ward the authority of the guardian expired.—*IN RE LIVERMORE'S ESTATE*, Cal., 64 Pac. Rep. 113.

33. **HABEAS CORPUS**—Conviction—Defective Judgment.—Where defendant, after commitment for embezzlement, was duly tried and convicted, but the judgment entered was defective, he will not be discharged on *habeas corpus*, since the sheriff is justified in holding him under the original commitment and the subsequent proceedings prior to judgment.—*EX PARTE WALKER*, Cal., 64 Pac. Rep. 135.

34. **HABEAS CORPUS**—Waiver.—The petitioner was arraigned for trial and tried upon a charge of felony in a court of competent jurisdiction. He was found guilty, and imprisoned in the penitentiary. He now claims that such imprisonment is illegal, for the reason that the act creating the court before which he had his preliminary examination was unconstitutional. He in no way raised this question in the trial court. Held, that he has waived his right to raise it upon an application for a writ of *habeas corpus*.—*IN RE BROWN*, Kan., 64 Pac. Rep. 75.

35. **HABEAS CORPUS**—Writ of Error to Federal Supreme Court—Custody of Prisoner.—Where a defendant was convicted of a felony, and the judgment was affirmed by the supreme court, and defendant was granted a writ of error to the federal supreme court, the sheriff had no authority to deliver the defendant to the warden of the State prison pending the decision of the federal court, since the writ of error operated as a *supersedeas*.—*EX PARTE RODLEY*, Cal., 64 Pac. Rep. 91.

36. **HOMESTEAD**—Death of Owner—Rights of Heir.—The owner of a farm occupied as a homestead resided on the same with an unmarried daughter, 27 years old. He died intestate, leaving the daughter as his sole heir, and she continued to occupy the land. Held, that the land was subject to sale for the debts of the decedent.—*BATTEY V. BARKER*, Kan., 64 Pac. Rep. 75.

37. **HOMESTEAD**—Occupation After Judgment Rendered.—Where a lot was first occupied as a homestead by a judgment debtor after rendition of the judgment, and an execution on such judgment was subsequently issued, but before the expiration of the judgment lien,

the lot was subject to be sold to satisfy the judgment.—*BURGHAUER V. PARKER*, Ark., 61 S. W. Rep. 831.

38. **HOMESTEAD**—Sale on Execution—Purchase Money.—Where plaintiff purchased land, and assumed as part of the price a debt of the seller to a third person incurred in the purchase of a horse, and executed his note therefor to such third person, the payee thereof may collect it by selling the land under execution, though it is the maker's homestead, since, as the note was given for part of the price, the homestead is not exempt under Const. art. 9, § 8, providing that a homestead is subject to the lien for the purchase money.—*BROWN V. ENNES*, Ark., 61 S. W. Rep. 879.

39. **HUSBAND AND WIFE**—Right to Recover for Wife's Services.—Laws 1884, ch. 381, permitting a wife to contract for her own benefit, does not prevent a husband, living with his wife, from suing a third person for services performed by the wife under a contract made with the husband.—*HOLCOMB V. HARRIS*, N. Y., 59 N. E. Rep. 520.

40. **INFANTS**—Service—Compensation.—A minor, who enters a family and receives the attention and care and the ordinary necessities furnished a natural member, cannot recover for his services rendered to the head of the family during minority, unless an agreement to that effect be shown by clear, direct, and positive evidence; and, if the circumstances, negative positive testimony adduced to support his claim for compensation, the proof is insufficient to justify a recovery.—*WALKER V. TAYLOR*, Colo., 64 Pac. Rep. 192.

41. **INSURANCE**—Payment of Premium—Waiver.—An oral agreement between the insurer and the assured, that insurer should hold the policy until payment of the first quarterly premium, during which time it should be in full force, does not contradict the terms of the policy itself as to payment of premium in advance.—*PRUDENTIAL INS. CO. V. SULLIVAN*, Ind., 59 N. E. Rep. 878.

42. **INSURANCE**—Proof of Loss—Time—Mailing.—A condition of a fire policy, requiring insured to furnish proof of loss within a certain time, is broken when the insurer does not receive them until after such time, though insured mailed them before the time had expired.—*PEABODY V. SATTERLEE*, N. Y., 59 N. E. Rep. 818.

43. **JUDGMENT**—Foreign Judgment—Divorce—Life Insurance.—Plaintiff was served with process in a divorce action in Hawaii, brought by her husband's guardian, on the ground of adultery, and appeared therein by attorney, but before judgment removed to California to make it her permanent home. The judgment was merely a decree for divorce, and did not deal with property rights; but a statute of Hawaii provided that, when a divorce was decreed for the adultery of the wife, the husband should hold her personal estate forever. Held, in an action in California on a policy of insurance on her husband's life, payable to plaintiff, that she was entitled to recover, since, as she was domiciled in California at the time of the judgment for divorce, the statute of Hawaii had no operation on her or her personal property.—*McGREW V. MUTUAL LIFE INS. CO. OF NEW YORK*, Cal., 64 Pac. Rep. 108.

44. **JUDGMENT**—Interest—Execution Sale.—A judgment creditor is entitled to interest upon his judgment until the same is actually paid.—*TROMPER V. HAMMOND*, Neb., 55 N. W. Rep. 436.

45. **JUDGMENT**—Vacation.—Under Burns' Rev. St. 1894, § 399 (Hornor's Rev. St. 1897, § 396; Rev. St. 1891, § 395), providing that the court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect on complaint filed within two years, a judgment rendered against one who was insane at the time, though he had not been adjudged so, will be set aside.—*JUDD V. GRAY*, Ind., 59 N. E. Rep. 849.

46. **LANDLORD AND TENANT**—Constructive Eviction.—Where a landlord has had work done and repairs made by independent contractors on his premises adjacent to leased premises, and has provided means whereby such repairs can be made without injury or inconvenience to the tenant of the leased premises, the tenant is not entitled to set off damages for interference with his enjoyment of the leased premises, caused by the carelessness of the contractor, against the amount of rent due, since the landlord is not bound to defend the demised premises against trespassers and the wrongful acts of third persons.—*TALBOT V. ENGLISH, Ind.*, 59 N. E. Rep. 657.

47. **LANDLORD AND TENANT**—Covenants—Notice to Perform.—Where a lease provided that defendant lessee would not underlet any portion of the premises without plaintiff's consent, in an action to recover possession for breach of such condition a contention that it would not lie because no notice requiring the performance of the covenant was served on defendant as required by Code Civ. Proc. § 1161, was without merit, since such notice has no application to a covenant that cannot be performed after notice.—*HARLOW LAMBIE, Cal.*, 64 Pac. Rep. 38.

48. **LIFE INSURANCE**—Mutual Benefit Associations—Complaint—Allegations.—Where suit is brought against a mutual benefit life association on a beneficiary's certificate, where liability is conditioned on the member being in good standing at the time of his death, it is not necessary for the complaint to allege that the member was in good standing, since this is a fact peculiarly within the knowledge of the defendant, and may be made use of as matter of defense, which plaintiff is not required to anticipate.—*SUPREME LODGE KNIGHTS OF PYTHIAS V. FOSTER, Ind.*, 59 N. E. Rep. 377.

49. **LIMITATIONS**—New Promise—Evidence.—Defendant ran an open store account with plaintiff from 1885 to 1888, but from that date until 1894 there were neither credit nor debit entries made therein; and plaintiff sold out his mercantile business and commenced a different business, and in 1894 sold clover and timothy seed to defendant's husband, and the price thereof was entered on the account as cash. The husband testified that he gave a note therefor, which was denied by plaintiff. Defendant owned a farm, on which the seed was used, but it was operated by her husband, who supported the family; and the defendant had never notified plaintiff to sell goods to her husband. Held, that the latter transaction was not a continuation of the old account, so as to prevent the running of limitations.—*MOORE V. BLACKMAN, Wis.*, 55 N. W. Rep. 429.

50. **LIMITATIONS**—Tolling Statute—Payment by Principal.—In an action against a husband and wife to foreclose a mortgage executed by both on the wife's property, a payment made by the husband was relied on to take the note out of the statute of limitations. The wife pleaded that she was surety only on the note, and that the payments were not made by her or for her, or with her knowledge or consent. The plaintiff replied that the money obtained on such note and mortgage went to pay off a valid lien on the wife's property. Held error for the court to exclude evidence tending to support such reply.—*HAWKINS V. KING, Kan.*, 64 Pac. Rep. 32.

51. **LIMITATION OF ACCOUNTS**—Pledges.—Plaintiff's goods, in possession of her son-in-law, were pledged by him to defendant to secure his debt. More than three years before commencing the action, plaintiff learned of the pledge, and notified defendant that the goods were hers, but made no demand for their surrender. Afterwards defendant sold the goods, and applied the proceeds on the debt of the pledgor. Held, that the statute of limitations against an action for conversion of the goods commenced to run at the time defendant received the goods in pledge, without demand, hence plaintiff's action was barred, though

brought within three years after the goods were sold.—*KIRKHEAD V. HOLMES & HULL FURNITURE CO., Wash.*, 64 Pac. Rep. 157.

52. **MANDAMUS**—Remand—Mandate.—*Mandamus* is an appropriate remedy to make the mandate of reviewing court effective.—*STATE V. NORRIS, Neb.*, 55 N. W. Rep. 485.

53. **MARRIAGE**—Divorce—Evidence—Presumption.—On an issue as to whether defendant was the wife of deceased, evidence that she married deceased in Colorado six years after his separation from his first wife in Pennsylvania, with whom he had lived but three years, and whom he left, believing her guilty of conduct which would entitle him to a divorce, and that the first wife never obtained a divorce, but married again; the testimony of such first wife that deceased never obtained a divorce from her, and that no papers for that purpose were ever served on her; and the fact of the first marriage—were insufficient to overcome the presumption of the legality of the second marriage, and establish that deceased was not divorced from his first wife at the time of the second marriage.—*PITTINGER V. PITTINGER, Colo.*, 64 Pac. Rep. 24.

54. **MASTER AND SERVANT**—Independent Contractors.—Where the servants of independent contractors, engaged in repairing a building used an ashlift belonging to the owners of the building for the purpose of removing dirt from the basement, the owners are not liable for an injury to a servant of the contractors resulting from a defect in the lift, though it was used with the consent of their engineer in charge of the machinery in the building, they being under no obligation to furnish any appliance.—*BUSH V. GRANT, Ky.*, 61 S. W. Rep. 323.

55. **MASTER AND SERVANT**—Negligence.—Where a mining company was excavating two tunnels—one above the other—on a hillside, and a rock negligently ordered thrown down the hill by the superintendent of the gang at the upper tunnel, struck and injured a man working under another superintendent at the lower tunnel, the superintendent of the upper tunnel gang and the injured man were not fellow-servants, not having opportunity to take precautions against each other's negligence.—*UREN V. GOLDEN TUNNEL MIN. CO., Wash.*, 64 Pac. Rep. 174.

56. **MASTER AND SERVANT**—Wrongful Discharge.—Where an employee, hired for the term of one year, was wrongfully discharged before the expiration of the term, and commenced an action for damages two days thereafter, but the trial was not had until after expiration of the term, he is entitled to recover the same damages that he would have been entitled to recover had the action been commenced after such expiration, and is not limited to the damages accruing between the breach and the commencement of the action.—*HOWAY V. GOING NORTHEUP CO., Wash.*, 64 Pac. Rep. 136.

57. **MINES AND MINING**—Mining Claims—Assessment Work.—An admission in defendant's pleading in an action to quiet title to a mining claim, that plaintiff was the owner of the claim during certain years, is an admission that he did the requisite amount of assessment work during such years.—*WRIGHT V. KILLIAN, Cal.*, 64 Pac. Rep. 98.

58. **MORTGAGE**—Assignment—Failure to Record.—The failure of the assignee of a mortgage to have the assignment to him acknowledged and recorded as required by chapter 160 of the Laws of 1897 does not annul the mortgage, nor destroy the mortgage lien, but only precludes the introduction of such assignment as evidence in any court of the State; and where parties to a foreclosure proceeding stipulate that plaintiff, as assignee of a mortgage, is entitled to a judgment, unless the plaintiff's failure to have the assignment of the mortgage recorded defeats his right to a foreclosure, a judgment of foreclosure should be awarded.—*BURT V. MOORE, Kan.*, 64 Pac. Rep. 37.

59. MORTGAGES—Assignment—Suit by Assignee. — A mortgage assigned the notes and mortgages, and authorized the assignees to collect the mortgage debt, and provided that they should hold the proceeds in trust. Held, that it was not necessary for the assignees to set up in their complaint to foreclose the mortgage the facts creating the trust in order to sue in their own names.—CORTELYOU v. JONES, Cal., 64 Pac. Rep. 119.

60. MORTGAGE—Assignment of Note—Set off.— Mortgage coupon notes, payable to a payee named therein "or bearer," are subject in the hands of an assignee to any set-off or counterclaim which existed in favor of the maker at the time he received notice of the assignment.—HUBER v. EGNER, Ky., 61 S. W. Rep. 353.

61. MORTGAGE — Default — Election to Enforce. — Where a mortgage provides that the failure of the mortgagor to comply with any of its conditions shall cause the entire debt to become due, and provides further that the mortgagee may in such case, if he so elect, proceed at once, without notice, to enforce his security, the commencement of a foreclosure suit is notice of his election, and no other notice is necessary.—NATIONAL LIFE INS. CO. v. BUTLER, Neb., 85 N. W. Rep. 437.

62. MORTGAGE—Foreclosure—Answer. — Where the complaint on foreclosure referred to two other mortgages on the same property held by the defendants, and alleged an equality in the lien of the three mortgages, and one of the defendants answered, denying the equality, and alleging priority of lien, and demanded judgment that such priority be decreed, and for a foreclosure, and plaintiff did not reply, it was error to enter judgment for defendant because of the failure to reply, since, until the issue as to the equality of the mortgages, raised by the complaint and answer, was disposed of, no question arose on the counterclaim.—WADE v. MILLER, N. Y., 59 N. E. Rep. 825.

63. MORTGAGES — Foreclosure — Notice. — Where a holder of mortgage bonds asks foreclosure on the ground that the trustee under the mortgage has abandoned his trust, and that his interests are antagonistic to the bondholders, notice to such trustee of an application for the appointment of a receiver will not bind other bondholders, nor parties to the action.—BELKNAP SAV. BANK OF LAGONIA, N. H., v. LAMAR LAND & CANAL CO., Colo., 64 Pac. Rep. 212.

64. MORTGAGE—Installments—Default—Waiver.— Where several notes, maturing one each month, are secured by a mortgage, which provides that on default in the payment of any three notes all the remaining unpaid notes shall become due, on such default limitations begin to run against the entire debt.—SAN ANTONIO REAL ESTATE, BUILDING & LOAN ASSN. v. STEWART, Tex., 61 S. W. Rep. 886.

65. MORTGAGE—Trust Deed—Subsequently Acquired Property.—Where a suit to foreclose a trust deed is consolidated with a pending suit to enforce a junior trust deed against the objection of the trustee of the latter, but no further proceedings are had in the latter suit, and the beneficiaries of such junior trust deed appear in court and consent to the foreclosure and to the consolidation, the error in the consolidation is harmless, and will not be considered on appeal.—LAMAR LAND & CANAL CO. v. BELKNAP SAV. BANK OF LAGONIA, N. H., Colo., 64 Pac. Rep. 210.

66. MUNICIPAL CORPORATIONS—City Officer—Salary—Estoppel.—The city in February, 1896, fixed the salary of firemen for the ensuing year, and in September passed a resolution reducing the compensation of firemen, and requiring the mayor to call a meeting of the firemen to secure their acceptance of a contract for the reduction of their salary. Held, that the contract was void as against public policy, and signing it did not estop a fireman from demanding his full salary.—NELSON v. CITY OF SUPERIOR, Wis., 85 N. W. Rep. 412.

67. MUNICIPAL CORPORATIONS—Loans—Ultra Vires.— Where officers of a municipality, assuming to act for it, and having apparent authority, borrow money to be used for a lawful purpose, and it is so used, for the benefit of the city, the law will imply a promise to return the same, on which an action for money had and received will lie.—THOMPSON v. TOWN OF ELTON, Wis., 85 N. W. Rep. 425.

68. MUNICIPAL CORPORATIONS—Streets—Negligence.—Where a complaint alleges that plaintiff will be incapacitated from doing his work for two years, and also that he is permanently injured, and will continue to suffer pain and anguish for the rest of his life, expert testimony showing that plaintiff is permanently injured is admissible.—TAYLOR v. CITY OF BALLARD, Wash., 64 Pac. Rep. 145.

69. PARENT AND CHILD — Adoption — Contract to Leave Property.—A contract with a mother, by which A agrees to take the child of the former, and maintain him as her own child, and at her death to give him her property, is not rendered invalid by the additional provision that she will make him her sole heir, since the contract is sufficient without the latter clause.—WINNE v. WINNE, N. Y., 59 N. E. Rep. 582.

70. PARTNERSHIP—Action—Promise by One Partner.—Where a complaint alleged that between two certain dates defendant and another were partners running a hotel; that during that time plaintiff sold them milk, for which there was an unpaid balance; and that about the last named date defendant purchased his partner's interest in the business, agreeing to pay the firm debts as part of the consideration,—it stated a cause of action on the promise of defendant to pay the debt owing plaintiff.—MCGIBBON v. WALSH, Wis., 85 N. W. Rep. 409.

71. PARTNERSHIP — Live Stock Shipment.—An agreement between two persons, one to furnish money to purchase and ship cattle, the other to perform the labor of buying and shipping them; upon sale, the profits to be shared and the losses to be borne equally,—constitutes them partners as to one who has inflicted loss upon them by injuring the cattle, and a suit for damages for the injury must be brought in the name of both.—ATCHISON, ETC. RY. CO. v. HUCKLEBRIDGE, Kan., 64 Pac. Rep. 58.

72. PRINCIPAL AND SURETY — Contractor's Bond—Alteration.—Where plaintiff made the last payment to a contractor for erecting a house one day before the day stipulated therefor in the contract, there was no alteration of the contract which would release the sureties on the contractor's bond from liability on a claim for a mechanic's lien.—MARRE v. INGLE, Ark., 61 S. W. Rep. 369.

73. PRINCIPAL AND SURETY—Release of Surety.—The release of security for a certain debt, held by the creditor, releases a surety obligated for such debt, to the extent of the value of the security so released, where the creditor releases such security without the consent, express or implied, of the surety.—FIRST NAT. BANK OF HAILEY v. WATT, Idaho, 64 Pac. Rep. 223.

74. PUBLIC LANDS — Mining Claim — Homestead.—A homestead title to land containing minerals is good, as against a subsequent mining claim located thereon, though Rev. St. U. S. § 2313, reserves all mineral lands from sale, as the action of the land department in issuing the patent was conclusive as to the character of the land, in the absence of fraud, mistake or imposition.—STANDARD QUICKSILVER CO. v. HABISHAW, Cal., 64 Pac. Rep. 113.

75. QUIETING TITLE—Limitations.—One in possession of real estate, without title thereto, cannot maintain an action to quiet title in himself as against the holder of the legal title, under a deed absolute in form, to which deed he is not a party, upon the ground that such deed is in fact a mortgage given to secure a debt due from himself to the holder of the legal title, and that such debt is barred by the statute of limitations.—BURDITT v. BURDITT, Kan., 64 Pac. Rep. 77.

76. **REFLEVIN—Damages—Evidence.**—In estimating damages, the value of property to the owner thereof deprived of its possession is the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase.—**GEORGE R. BARNES LIVE-STOCK COMMISSION CO. v. MCKINSTER**, Okla., 64 Pac. Rep. 14.

77. **RES JUDICATA—Judgment on the Merits.**—A judgment of the court that the defendant, Lucas, should recover his costs, and that there was "no joint liability on the part of the co-defendants," is not a judgment upon the merits, and not final and conclusive in the sense that a plea of *res judicata* may be founded upon it in a separate action by the same plaintiff against the defendant, Lucas, involving the right to recover for the conversion of the subject-matter, which was a part of the controversy in the action first mentioned.—**BRAKEFIELD v. LUCAS**, Okla., 64 Pac. Rep. 10.

78. **RES JUDICATA—Writ of Error—Dismissal.**—When a court, having jurisdiction of the subject matter and the parties to an action, renders judgment therein, and the party aggrieved thereby fails to effect an appeal from such judgment within the time and in the manner provided by law, such judgment is *res judicata* as to all matters necessarily involved in such action, and therefore presumably considered by the court, save alone such propositions appearing in the record as relate to the jurisdiction of the court over the subject-matter, and parties to such action.—**MANGLEY v. PARK**, Kan., 64 Pac. Rep. 28.

79. **SCHOOLS AND SCHOOL DISTRICTS—Power of Trustees—Liability of Township for Money Borrowed.**—Where a school house is being erected by the trustee of a school township, and he borrowed money from plaintiff to pay the contractor, by representing that the township has not the necessary funds, and the money is paid to the contractor, the plaintiff may recover the sum so loaned from the township, though the trustee had no power to borrow the money.—**WHITE RIVER SCHOOL TR. v. DORRELL**, Ind., 89 N. E. Rep. 867.

80. **SPECIFIC PERFORMANCE—Penalty.**—A contract requiring the performance of certain acts, and adding a penalty to secure the performance, will be specifically enforced, though a mere alternative contract will not be so enforced.—**AMANDA CONSOL. GOLD MIN. CO. v. PEOPLE'S MIN. & MILL CO.**, Colo., 64 Pac. Rep. 218.

81. **TAXATION—License Tax—Validity.**—License taxes, whether for the purpose of regulation or revenue, or both, may be legally imposed; and the amount, as well as the method of imposing such taxes, is left to legislative discretion and judgment.—**IN RE MARTIN**, Kan., 64 Pac. Rep. 48.

82. **TAXATION—Sale—Redemption by Minor.**—Where the State acquires land at a tax sale, while Sand. & H. Dig. §§ 4506, 6015, authorizing a minor to redeem land from such sale within two years after attaining his majority, is in force, the right of a minor to redeem cannot be taken away by a subsequent act of the legislature.—**MOORE v. INBY**, Ark., 61 S. W. Rep. 871.

83. **TELEGRAPH COMPANY—Cutting Trees Along Highway—Damages.**—In an action against a telegraph company by the owner of a farm for the wrongful cutting of shade trees growing along a highway which passes through it, an oral license from a tenant not authorized to give it if acted upon in good faith, and the instructions of the company to its servants with respect to the manner of trimming trees along its line, if given in good faith, are competent to defeat or mitigate the recovery of exemplary damages, though not competent to prevent the recovery of full

compensation.—**WESTERN UNION TEL. CO. v. SMITH**, Ohio, 59 N. E. Rep. 890.

84. **TRIAL—Motions to Direct Verdict.**—Where, at the conclusion of the evidence in a case, each party requests the court to instruct the jury to render a verdict in his favor, the parties thereby clothe the court with the functions of a jury; and, where the party whose request is denied does not thereupon request to go to the jury upon the facts, the verdict so rendered should not be set aside by a reviewing court, unless clearly against the weight of the evidence.—**FIRST NAT. BANK v. HAYES**, Ohio, 59 N. E. Rep. 893.

85. **TRUST—Perpetuities—Charitable Trust.**—Where the title to property vests in trustee for a legal charitable use, and the particular plan or scheme of executing the trust, as indicated by the donor in the instrument creating the charity, becomes impracticable, or even impossible of performance, the trust property does not revert to the heir of the donor, in the absence of an express provision to that effect in the creation of the trust; but, so long as the beneficiaries of the trust may be ascertainable, a court of equity will compel the execution of the trust along lines as nearly consonant as possible with the general plan of the donor.—**TROUTMAN v. DE BOISSIERE ODD FELLOWS' ORPHANS' HOME & INDUSTRIAL SCHOOL ASSN.**, Kan., 64 Pac. Rep. 43.

86. **VENDOR AND PURCHASER—Water Power—Representation.**—Where the vendor of a water power stated that a certain horse power could be developed from the stream, and the amount of water was in fact less than that given by a mathematical calculation based on the horse power stated by defendant, and the purchaser sued to cancel notes given in the purchase on the ground that defendant had misrepresented the amount of water, a nonsuit was proper, since plaintiff should have made his own calculation, it not appearing that defendant pretended to be an hydraulic expert.—**LLOYD v. KEHL**, Cal., 64 Pac. Rep. 125.

87. **WATERS—Irrigation Canal—Maintenance and Repair.**—Where the expense of maintenance and repairing an irrigating canal is to be borne ratably by the parties entitled to convey water through the same in proportion to the amount of water used, the expense of collecting their ratable portion from parties who have refused to pay if a part of the necessary expense of maintenance, since, unless the rate due from such parties is collected, there would be no fund for maintenance and repair.—**ROGERS v. RIVERSIDE LAND & IRRIGATING CO.**, Cal., 64 Pac. Rep. 95.

88. **WATERS AND WATER COURSES—Appropriation—Priority—Pleading.**—In a suit to establish priority of appropriation of water for power, and to restrain interference therewith, defenses of abandonment, estoppel, and increase of the natural flow of the streams constituted new matter, and were of no avail, not being specially pleaded.—**HECTOR MIN. CO. v. VALLEY VIEW MIN. CO.**, Colo., 64 Pac. Rep. 205.

89. **WATER COURSES—Diversion—Injunction.**—A lower riparian proprietor may enjoin an upper one from diverting waters from the stream which the latter does not apply to some beneficial use, but allows to run to waste.—**CAMPBELL v. GRIMES**, Kan., 64 Pac. Rep. 62.

90. **WILLS—Precatory Trust.**—Where testator and his brother had for many years been engaged as partners in the jewelry business, and testator contemplated that the business would be continued by his widow and his brother as partners, the expression by testator in his will of the desire that his friend J "be retained in the employ of the firm on such liberal terms as his long and faithful service entitle him to," did not create a precatory trust, and the widow, having bought the brother's interest in the business, is under no obligation to keep J in her service.—**JEWELL v. BARNES' ADMR.**, Ky., 61 S. W. Rep. 860.

